No. 83-1196

IN THE

Supreme Court of the United States

October Term, 1983

AMERICAN TRUCKING ASSOCIATIONS, INC., NEW YORK STATE MOTOR TRUCK ASSOCIATION, INC., NEW YORK STATE MOVERS' AND WAREHOUSEMEN'S ASSOCIATION, INC., FORT EDWARD EXPRESS CO., HALLAMORE MOTOR TRANSPORTATION, INC., MAISLIN TRANSPORT OF DELAWARE, INC., MUSHROOM TRANSPORTATION CO., RED STAR EXPRESS LINES OF AUBURN, INC., SHAY'S SERVICE, INC. and TEAL'S EXPRESS, INC.,

Appellants,

against

NEW YORK STATE TAX COMMISSION, JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Members of the New York State Tax Commission, and ROBERT ABRAMS, Attorney General of the State of New York,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS OR AFFIRM

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Dated: February 13, 1984

Question Involved.

Whether the New York Court of Appeals correctly held that New York Tax Law, §184, which imposes a franchise tax on corporations principally engaged in a trucking business and others, measured by their gross earnings from all sources within the State determined by multiplying their gross earnings by a fraction, the numerator of which is their mileage within the State and the denominator is their mileage within and without the State, and provides that if that method of allocation does not equitably reflect gross earnings within the State with respect to certain corporations the State Tax Commission shall prescribe methods which fairly and equitably reflect gross earnings from all sources within the State, taxes only those earnings from activities which have a substantial nexus with the State and which are fairly apportioned.

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CASES:

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Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK.

MOTION TO DISMISS OR AFFIRM.

The appellees move the Court to dismiss the appeal on the ground that it is manifestly evident that this case presents no substantial Federal question. This appeal is

from an order of the Court of Appeals of the State of New York, entered on October 20, 1983 which unanimously affirmed a judgment of the New York Supreme Court at Special Term in Albany County dated December 10, 1982.

The opinion of the New York Court of Appeals, dated October 20, 1983 is reported at 60 NY2d 745 and is reprinted in the appellants' appendix (App) to its jurisdictional statement at page 1a. The unpublished order of the New York Court of Appeals appears in the addendum to this brief at page A1. The decision of the New York Supreme Court dated December 1, 1982 is reported at 120 Misc 2d 191; 467 NYS2d 744 (1982) and is reprinted at App 6a-11a. The unpublished judgment of New York Supreme Court appears at App 3a-5a.

Relief Requested.

This Court should dismiss the appeal on the ground that it does not present a substantial Federal question. Alternatively, this Court should affirm for the reasons expressed by the New York State Court of Appeals below.

Constitutional and Statutory Provisions.

Commerce Clause (Article I, section 8, clause 3) and Due Process Clause (Amendment XIV) of the United States Constitution.

New York Tax Law, § 184, as amended by chapter 481 of the 1981 Laws of New York.

These constitutional and statutory provisions are reproduced in pertinent part in the addendum to this brief.

Statement of the Case.

The appellants are three trade associations and seven corporations principally engaged in the trucking business. One hundred percent of the transportation activities of two of the corporations occurs in New York State, three of the transportation corporations engage in transportation activities in New York State and also do an interstate business. Two companies engage in the trucking business in New York State, do interstate trucking business and also do business in Canada. All of the corporations are subject to the franchise tax imposed by New York Tax Law, § 184, as amended in 1981, which is measured by gross earnings from all sources in New York State.

In the New York Court of Appeals and Supreme Court the appellants challenged § 184 only insofar as it related to gross earnings from transportation services and not those earnings from items such as interest, dividends, rentals, repairs and storage. The challenged tax is a franchise tax on a corporation "which shall be equal to three-quarters of one per centum upon its gross earnings from all sources within this state." A trucking corporation "shall determine its gross earnings from transportation * * * within this state by multiplying its gross earnings from transportation * * * within and without the state by a fraction, the numerator of which is the taxpayer's mileage within this state and the denominator of which is the taxpayer's mileage within and without this state * * *."

As interpreted by the New York Tax Commission "mileage" in the context of the above-stated provision means actual revenue miles for purposes of the numerator and denominator of the allocation fraction. Nonrevenue miles, such as deadheading, are not included in the

numerator and denominator. New York State Department of Taxation and Finance, Technical Services Bureau Memorandum dated March 12, 1982 (TSB-M-82[9]C) set out in Addendum C.

Subdivision (f) of section 184 provides that

> "where the tax commission decides that with respect to a certain corporation the method prescribed above does not fairly and equitably reflect gross earnings from all sources with this state, the tax commission shall prescribe methods of allocation or apportionment which fairly and equitably reflect gross earnings from all sources within this state."

The New York Court of Appeals affirmed the judgment of the New York Supreme Court that the tax is constitutional for the reason stated by the lower court adding that

> "the subject tax law empowers the tax commission to adjust the allocation formula with respect to a particular corporation to 'fairly and equitably reflect gross earnings from all sources within this state' (Tax Law, § 184, subd 4, par [f])." (App 1a)

The lower court found that

> "what the statute in substance does is to apportion gross receipts into two groups; those having a substantial nexus with the State of New York based upon actual revenue miles in the State of New York and those gross receipts derived wholly from external sources. Thus the New York statute taxes 100 percent of gross receipts based upon New York

State revenue miles and does not in any way tax gross receipts based upon revenue miles in other states or countries." (App 7a)

ARGUMENT.

The appellants have not raised a substantial Federal question since it is evident that the New York Tax Law, § 184 imposes a tax only on gross earnings which have a substantial nexus with the state, are fairly apportioned and does not conflict with the due process and commerce clauses.

For the purposes of the due process and commerce clauses of the United States Constitution, where a taxpayer has a substantial nexus with a State and where there is a rational relationship between the tax imposed on the taxpayer's business activity within the State and benefits afforded by the State, the tax will be upheld unless it is shown that the tax discriminates against interstate commerce or is not fairly apportioned. *Complete Auto Transit v. Brady*, 430 US 274, 279 (1977).

The appellants contend (Jur Stat, p 12) that the New York tax is unconstitutional not because the statute provides for "an unfair method of apportionment but because it seeks to apportion gross receipts that, because they lack a nexus with New York, may not be apportioned by any method." They argue that earnings from trips totally outside of New York cannot be included in the apportionment formula because such inclusion constitutes extraterritorial taxation, which is prohibited by the Commerce and Due Process Clauses of the United States Constitution. In so arguing, they leap to the baseless conclusion that because earnings from activities outside of New

York are included in the formula used to determine New York gross earnings, earnings from without the State are being taxed by New York.

The appellants do not question the jurisdiction of New York to impose a franchise tax on them measured by their New York gross earnings. It is well-settled and the appellants do not dispute that States can tax gross receipts of transportation companies, engaged in interstate commerce, apportioned to in-State activities determined by mileage.

In *Maine v. Grand Trunk Railway Company,* 216 US 217 (1891), the state statute required corporations operating a railroad to pay an annual franchise tax determined by the amount of its gross transportation receipts and when applied to a railroad lying partly within and partly without the State, including Canada, the gross receipts were determined in proportion to the number of miles of railroad operated in the State to the total number of miles the railroad operated. The Court held that the tax did not conflict with the United States Constitution.

In *Central Greyhound Lines, Inc. v. Mealey,* 334 US 653d (1948), New York taxes unapportioned gross receipts from transportation between points within the State, but over routes which utilized highways of Pennsylvania and New Jersey to the extent of 42.53%. The Court held that New York could tax gross receipts from the transportation apportioned as to the mileage within the State, but the tax on the gross receipts from that portion of the mileage outside the State unduly burdens interstate commerce in violation of the Commerce Clause of the United States Constitution. The Court noted that the entire New York tax did not need to fall, however, and it could be fairly apportioned to the business done within the State by a fair

method of apportionment. The statute under consideration permitted such apportionment and the matter was remanded by the Court to the New York Court of Appeals to determine the apportionment. On remand, the New York Court of Appeals modified the determination of tax liability to the extent of 42.53% of the tax involved (298 NY 876 [1949]).

In *Canton Railroad Co. v. Rogan,* 340 US 511 (1951), and *Western Maryland Railroad Co. v. Rogan,* 340 US 520 (1951), Maryland imposed a franchise tax on railroads measured by gross receipts apportioned to the length of their lines within the State. The Court sustained the tax as not violative of the Commerce Clause and the Import-Export Clause of the United States Constitution.

In *Railway Express Agency, Inc. v. Virginia,* 358 US 434 (1959), a franchise tax was levied by Virginia only on express companies measured by gross receipts derived from operations within the State including receipts from transportation within the State of express transported through, into or out of the State. As applied to a foreign corporation doing an exclusive interstate business in the State and owning property there, the Court held that the tax did not violate the Commerce Clause of the United States Constitution. The Court at 358 US 444, 445 said:

> "As this Court said in *Nashville, C. & St. L. R. v. Browning,* 310 U. S. 362, 365-366 (1940):
>
> " 'In basing its apportionment on mileage, the Tennessee Commission adopted a familiar and frequently sanctioned formula. *Pullman's Car Co. v. Pennsylvania,* 141 U. S. 18; *Maine v. Grand Trunk Ry. Co.,* 142 U. S. 217; *Pittsburgh, C., C. & St. L. Ry. Co. v. Backus,* 154 U. S. 421; *Branson v. Bush,*

> 251 U. S. 182. See 2 Cooley on Taxation, pp. 1660-64. Its asserted inapplicability to the particular situation is rested on petitioner's evidence as to the comparative revenue-producing capacity of its lines in and out of Tennessee. But both the Commission and the Supreme Court of the state thought that this evidence, however weighty, was insufficient to displace the relevance of the formula. *In a matter where exactness is concededly unobtainable and the feel of judgment so important a factor, we must be on guard lest unwittingly we dispute the tax officials' judgment with our own.* Certainly we cannot say that the combined judgment of Commission, Board, and state courts is baseless.' (Emphasis added.)"

While *Railway Express* involved a taxpayer's failure to file complete information on in-State activities, the case does not include any words limiting its holding to such situations in upholding a formula which used miles in the State of Virginia over miles in all other States times all gross receipts.

Appellants' contention that earnings from transportation outside of New York may not be included in the apportionment formula because it constitutes extraterritorial taxation is demonstrably without merit and contrary to fact. Appellants have not shown that the formula will reach earnings which are not from New York sources.

It is only by conjecture that it is possible for New York to reach earnings of the appellants which are not from New York sources by the mechanical application of the apportionment formula. This could occur if the appellants on the average charged rates for shipments at a higher

level in jurisdictions other than New York. The appellants do not claim this nor have they demonstrated that they do this. Indeed, one can assume they would have attempted to make such a showing if it were the case, since they have the requisite information available. For that matter, New York shipping rates may be higher than those of other jurisdictions. As the cases discussed above show, it is reasonable to assume in the first instance that shipping rates are the same in all jurisdictions or that they average out to be the same in each jurisdiction. In the event this assumption could be shown to be incorrect, it still would not result in New York reaching extraterritorial values.

The New York statute is designed to prevent New York from imposing tax on any earnings which are not from New York sources by the application of the allocation formula. Under the provisions of subdivision (f) of section 184 of the New York Tax Law, gross earnings from transportation activities in other jurisdictions must be excluded from the formula if the statutory formula inequitably reflects earnings from outside New York. Only earnings from New York sources are subject to the tax. The tax rate is applied only to those gross earnings. No other State has jurisdiction to tax those earnings. Thus, the New York law in no way calls for multistate taxation of New York gross earnings.

Even if some overlapping taxation were possible under the allocation formula, it would not be sufficient to invalidate the formula. The Court in *Japan Lines, Ltd. v. County of Los Angeles*, 441 US 434, 455 (1979), pointed out:

> "Yet, this Court consistently had held that the Commerce Clause 'does not call for mathematical

> exactness nor for the rigid application of a particular formula; only if the resulting valuation is palpably excessive will it be set aside.' "

The appellants, citing *Japan Lines, Ltd.*, appear to contend (Jur Stat, p 14) that the apportionment provisions of the tax do not protect taxpayers from multiple taxation of their gross earnings because foreign countries can and do tax 100% of the value of property used in foreign commerce. There has been no showing made nor any claim made that Canada does or could tax New York gross earnings under its laws or its treaties with this country. No Federal law has been cited by the appellants which would preempt New York from imposing the tax. The holding in *Japan Lines, Ltd. v. County of Los Angeles*, 441 US 434 (*supra*), is no barrier to the § 184 tax. The issue in that case was whether instrumentalities of commerce, cargo containers that are owned, based and registered abroad, and that are used exclusively in international commerce, may be subject to apportioned *ad valorem* taxation by a State. The New York tax is distinguishable because it is not imposed on property. No claim has been made here that the New York tax prevents the Federal government from speaking with one voice in regulating commercial relations with foreign governments. The mere risk of exposure to multiple taxation certainly does not present this Court with a constitutional basis to invalidate the franchise tax. See *Moorman Mfg. Co. v. Blair*, 437 US 267 (1979) and *General Motors v. Washington*, 377 US 436, 448 (1964). In *Moorman*, the Court held that not only is it a prerequisite for a taxpayer to show that the State, whose taxation is being complained of, along with other States tax more than 100% of the taxpayers' relevant revenues, but it is also essential to show that the allegedly offending State, rather than some other State, was necessarily at fault in a

constitutional sense. New York cannot be found at fault, in the constitutional sense, with respect to the claim of double taxation. There is no substantiation of the claim of double or extraterritorial taxation and, indeed, the allocation utilized for the franchise tax has been constitutionally approved. It is the result reached not the method employed which is controlling. See *Federal Power Commission v. Conway Corp.*, 426 US 271, 279, 280 (1976); *Colorado Interstate Co. v. Federal Power Commission*, 324 US 581, 604 (1945).

New York's apportionment formula is the practical way to reach gross earnings from all sources in New York from transportation. It would not be feasible to sift out New York gross earnings without using an apportionment formula where a trucking company makes a single charge for a trip between a point in New York to a point in another State and different types of goods are transported with several pick up and delivery stops being made in both states.

Moreover, requiring trucking companies to report all gross receipts and revenue miles within and without the State, advances administrative convenience and verification of the tax. Administrative convenience within reasonable limits has been advanced by this Court to uphold the validity of federal and state tax laws (e.g. *Califano v. Goldfarb*, 430 US 199 [1977]; *Kahn v. Shevin*, 416 US 351 [1974]; *Halliburton Oil Well Cementing Co. v. Reily*, 373 US 64 [1963]; *New York Rapid Transit Corp. v. City of New York*, 303 US 573, 580, 581 [1938]; *Burnet v. Wells*, 289 US 670 [1933]). Gross earnings from transportation can be verified by examination of audited Federal corporation tax returns. 49 CFR Part 1249 requires motor carriers to file Form-M reports with the Interstate Commerce Commission on which their total inter-city transportation mileage is listed. These reports are available to

the New York State Tax Commission. Transportation companies file New York highway use and fuel tax reports which show New York highway mileage. As a result, State tax auditors by being able to use all these reports reduce and simplify field and desk audits which could not be done as conveniently and efficiently under a different allocation formula. The allocation formula deters trucking companies from improperly assigning earnings to out-of-State business. Certainly New York has the right to examine the books and all of the earnings of trucking corporations doing business in New York to determine if all New York earnings are reported. By requiring all earnings from transportation to be reported, New York does no more than examine all of the taxpayer's earnings but does not tax them.

The appellants contend (Jur Stat, pp 15-18) that New York is attempting to justify the tax under the unitary business principle and claim that the principle does not apply to gross receipts taxes. The tax needs no such justification nor have the courts below attempted to apply the principle in declaring that the tax does not violate the United States Constitution.

From all the foregoing, we submit that there is no substantial Federal question presented by this appeal.

CONCLUSION.

The appeal should be dismissed or, in the alternative, the order affirmed.

Dated: Albany, New York
February 3, 1984

Respectfully submitted,

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ADDENDUM A.

REMITTITUR.

COURT OF APPEALS,

STATE OF NEW YORK.

The Hon. Lawrence H. Cooke, Chief Judge, Presiding.

Sup C No. 432

AMERICAN TRUCKING ASSOCIATION, Inc., *et al.*,

Appellants,

v.

NEW YORK STATE TAX COMMISSION, *et al.*,

Respondents.

The appellants in the above entitled appeal appeared by Schnader, Harrison, Segal & Lewis, Esqs.;
the respondents appeared by Hon. Robert Abrams, Attorney General.

The Court, after due deliberation, orders and adjudges that the judgment is affirmed, with costs, in a memorandum. Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer, Simons and Kaye concur.

The Court further orders that the papers required to be filed and this record of the proceedings in this Court be remitted to the Supreme Court, Albany County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

JOSEPH W. BELLACOSA
Clerk of the Court

Court of Appeals, Clerk's Office, Albany, October 20, 1983.

ADDENDUM B.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

United States Constitution, Article I, section 8, clause 3 (the "Commerce Clause"):

> "The Congress shall have power * * * To regulate commerce with foreign nations, and among the several states, and with Indian tribes."

United States Constitution, Fourteenth Amendment (the "Due Process Clause"):

> "[N]or shall any state deprive any person of life, liberty, or property, without due process of law * * *."

New York Tax Law, § 184 as amended by chapter 486 of the New York Laws of 1981 provides in pertinent part:

> "§ 184. Additional franchise tax on transportation and transmission corporations and associations
>
> "1. Every corporation, joint-stock company or association formed for or principally engaged in the conduct of aviation, surface railroad, whether or not operated by steam, subway railroad, elevated railroad, canal, steamboat, ferry (except a ferry company operating between any of the boroughs of the city of New York under a lease granted by the city), express, navigation, pipe line, transfer, baggage express, omnibus, trucking, taxicab, telegraph, telephone, palace car or sleeping

car business, or formed for or principally engaged in the conduct of two or more of such businesses and every other corporation, joint-stock company or association formed for or principally engaged in the conduct of a transportation or transmission business not liable to taxation under section one hundred eighty-six of this chapter, for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or maintaining an office in this state, shall pay a franchise tax which shall be equal to three-quarters of one per centum upon its gross earnings from all sources within this state * * *.

* * *

"4. Allocation of gross earnings from transportation and transmission services.—(a) General. A transportation or transmission corporation shall determine its gross earnings from transportation and transmission services within this state (except as otherwise provided for in this subdivision) by multiplying its gross earnings from transportation and transmission within and without the state by a fraction, the numerator of which is the taxpayer's mileage within this state and the denominator of which is the taxpayer's mileage within and without this state during the period covered by the report or reports required by this chapter.

* * *

"(e) All other gross earnings, if any, shall be allocated to this state in the manner prescribed by

rules and regulations promulgated by the tax commission.

"(f) With respect to other types of transportation and transmission corporations or where the tax commission decides that with respect to a certain corporation the method prescribed above does not fairly and equitably reflect gross earnings from all sources within this state, the tax commission shall prescribe methods of allocation or apportionment which fairly and equitably reflect gross earnings from all sources within this state. Also, the tax commission may, in order to properly reflect gross earnings, determine the report period in which any item of gross earnings shall be included without regard to the method of accounting employed by a corporation taxable hereunder."

ADDENDUM C.

NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE

TAXPAYER SERVICES DIVISION

Technical Services Bureau

TSB-M-82(9)C
Corporation Tax
March 12, 1982

1981 LEGISLATION—SECTION 184 OF THE TAX LAW—ALLOCATION OF GROSS EARNINGS FROM TRANSPORTATION SERVICES OF CORPORATIONS PRINCIPALLY ENGAGED IN TRUCKING.

Chapter 486 of the Laws of 1981 provides for the allocation of gross earnings from transportation services of corporations principally engaged in trucking. The allocation of gross earnings from transportation services of such corporations is contained within the general allocation formula contained in section 184 of the Tax Law (Tax Law, § 184(4)(a)):

> Allocation generally—A transportation corporation shall determine its gross earnings from transportation and transmission services within the state (except as otherwise provided in section 184, e.g., aviation corporations, corporations engaged in the operation of vessels and telephone and telegraph corporations) by multiplying its gross earnings from transportation and transmission within and without the state by a fraction, the

numerator of which is the taxpayer's mileage within the state and the denominator of which is the taxpayer's mileage within and without this state during the period covered by the report or reports required under Article 9 of the Tax Law.

With respect to trucking corporations, "mileage" in the context of the above-stated provision means actual revenue miles for purposes of both the numerator and denominator of the allocation fraction. Nonrevenue miles, such as deadheading, are not included in either the numerator or denominator of the allocation fraction. The allocation formula with respect to trucking corporations takes into account actual revenue producing activity both within and without the State of New York.

Accordingly, a trucking corporation whose transportation services are performed within and without New York State will allocate its total gross earnings from transportation services within and without New York State on the basis of the following fraction to arrive at allocated gross earnings from transportation services to be included in the section 184 tax base.

$$\frac{\text{Actual revenue miles within NYS}}{\text{Actual revenue miles within \& without NYS}} \times \text{total gross earnings from transportation service} = \text{Allocated gross earnings from transportation services subject to tax}$$

A trucking corporation which renders transportation service solely within the State of New York must allocate 100% of its gross earnings from transportation services to the State of New York.

Gross earnings from other than transportation services (interest, dividends, etc.) shall be allocated to New York

State, pursuant to section 184(4)(e), in accordance with the rules and guidelines set forth by the State Tax Commission in *The Matter of American Telegraph and Telephone Co.*, (11/13/81); *The Matter of RCA Global Communications, Inc.*, (11/13/81); *The Matter of ITT World Communications, Inc.*, (11/13/81); and *The Matter of Overseas National Airways, Inc.*, (1/22/82).

The provisions under Chapter 486 of the Laws of 1981 are effective for all taxable periods beginning on or after January 1, 1981.